No. 15938

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

IRVING I. BASS, Trustee in Bankruptcy for the Estate of ZEPCO, INC., a California corporation,

Appellants,

vs.

ROBERT B. SHUTAN,

Appellee.

APPELLANTS' OPENING BRIEF.

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vs.

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Appellee.

APPELLANTS' OPENING BRIEF.

Statement of Jurisdiction.

This is an appeal from an order of the District Court, Southern District of California, Central Division, reversing on review Findings of Fact, Conclusions of Law and Order of a Referee in Bankruptcy. Jurisdiction of the District Court existed under Section 57d of the Bankruptcy Act, Title 11, United States Code, Chapter 6, Section 93. Jurisdiction of this Circuit Court of Appeals lies under Section 47(a) and (b) of Title 11, U. S. C. A.

Statement of the Case.

This is an appeal from an order of the District Court reversing Referee Joseph J. Rifkind on review. The appellee is the attorney for the bankrupt corporation and the matter involved is a claim filed by the appellee as a prior

wage claim based upon alleged assignments of wage claim checks of the bankrupt corporation to the appellee in payment for his legal services as attorney for the bankrupt.

The facts surrounding the claim of the appellee are that approximately one week prior to the filing of a petition for arrangement under Chapter XI of the Bankruptcy Act, Milo M. Turner, the president, sole shareholder, sole director, sole officer, and managing officer of the bankrupt corporation [see Tr. p. 63], visited the offices of the appellee with a view towards filing a petition for arrangement under Chapter XI on behalf of the bankrupt corporation. Milo M. Turner could not pay the fee requested by the appellee in the amount of $1,500.00 and it was agreed that Milo M. Turner would assign certain dishonored wage checks of the bankrupt corporation, which he had redeemed, to the appellee, and a written assignment was made and entered into. [See Tr. p. 64.]

At the time of the making of the so-called assignment the bankrupt corporation was insolvent and Turner was the only officer the corporation had ever had, and was the sole shareholder, although for convenience of executing the schedules in bankruptcy, one Sorenson was made a director and an officer of the corporation immediately prior to bankruptcy. [See Tr. pp. 45-46.] The Chapter XI proceeding was filed and proved abortive a few days subsequent to its filing and an order of adjudication was made and entered approximately 4 days after the filing of the chapter proceedings.

The Trustee filed objections to the claim of the appellee alleging that the effect of the transaction was that the corporation had cancelled its own indebtedness and that there was nothing left to assign to the appellee, that the appellee's claim should be denied and, in any event, should be subordinated to other claims and not allowed any prior status.

The Trustee, at the hearing before the Referee, urged that the claim should be denied or subordinated for the reasons that the bankrupt corporation was the *alter ego* of Milo M. Turner and the effect of Turner paying the corporation's dishonored checks was to cancel the corporation's indebtedness to the individual employees and to cancel the order to pay the check, the assignment therefore being an idle act as there was nothing left to assign. The Trustee claimed that in any event Turner, being the managing officer during the time that the debts were incurred, the sole officer and sole shareholder of this corporation, the Court, in equity and good conscience, should not allow Turner to participate as a prior wage claimant in his own corporation and should, in equity and good conscience, subordinate him to all other general unsecured claims and the appellee, being an assignee, should likewise be subordinated on the theory that he could obtain no greater rights than his assignor, the president of the bankrupt corporation. The Trustee also claimed that the transaction was a subterfuge attempting to circumvent Section 60d of the Bankruptcy Act, United States Code, Chapter 4, Section 96, wherein it is provided that

if money is paid directly or indirectly to a counselor at law, etc. for services rendered in connection with the bankruptcy proceedings, the Bankruptcy Court has power to review the reasonableness of the fees.

The Court made and entered Findings of Fact, Conclusions of Law and an Order sustaining the position of the appellant in each particular and the appellee filed the petition for review to the District Court.

The matter was orally argued before the Honorable Irving R. Kaufman, District Court Judge, a visiting Judge from New York, who wrote a memorandum opinion reversing the Referee in Bankruptcy and ordering that the claim of the appellee be accorded prior wage status. This memorandum opinion is a portion of the record on review and may be found at pages 33-39 of the Transcript. Issues in this appeal arise from the said memorandum opinion which, on page 35 of the Transcript, arrives at the conclusion that the sole issue is whether or not Milo M. Turner was the *alter ego* of the bankrupt corporation. The main portion of that opinion dwells on *alter ego* and concludes that there is insufficient evidence to support a finding of *alter ego,* makes only passing mention that wages or wage claims may be assigned to stockholders, and at page 37 of the Transcript hinges its determination on this issue on the fact that some cases hold that a shareholder and a director can receive an assignment of claims of corporation's employees, completely ignoring the point that Turner was not only a shareholder and director, but the sole managing officer and sole director of the bankrupt corpora-

tion, making no consideration of this issue. The Judge then, on pages 32 and 33 of the Transcript summarily disposes of the contention relation to Section 60d of the Bankruptcy Act by concluding that the funds were Turner's individual funds and the money did not come directly or indirectly from the bankrupt. No consideration was given as to whether or not under the circumstances the payment of the checks involved would be construed to be a capital contribution by Turner to the corporation and that the payment or payments therefore were payments of the corporation.

From the order based upon the memorandum opinion of Judge Kaufman, the appellant prosecutes this appeal.

Specifications of Errors Relied Upon.

The Court erred in each of the following respects:

1. In reversing the order of the Referee dated September 4, 1957.

2. In failing to affirm the order of the Referee dated September 4, 1957.

3. In setting aside Findings of Fact Nos. 1, 2, 3, 4, 5 and 6 dated September 4, 1957.

4. In setting aside Conclusion of Law No. 1.

5. In deciding in the memorandum opinion that Milo M. Turner was not the *alter ego* of the bankrupt and in not finding, that Milo M. Turner was the *alter ego* of the bankrupt corporation.

6. In not finding that irrespective of *alter ego* "any claims of Milo M. Turner should, in equity and good conscience, be subordinated in payment to claims of general creditors".

7. In not finding that irrespective of equitable theory or *alter ego,* any payments made by Milo M. Turner to wage claimants, whether from individual funds or not, amounted to capital contributions to the capital structure of the corporation and therefore cancelled such wage claims as against the corporation.

8. In not finding "that Robert H. Shutan, as the attorney for Milo M. Turner and as the attorney for the bankrupt corporation and assignee of Milo M. Turner, stands no better position than the would be assignor, Milo M. Turner."

9. In setting aside Conclusions of Law Nos. 2, 3 and 4.

10. In not finding that the procedure used by the appellee was an attempt to circumvent by subterfuge the effect of Section 60d of the Bankruptcy Act.

Summary of Argument.

In essence the entire argument of the appellant is devoted to the proposition of law that the reviewing Court should affirm the order of the Referee if the order is supported by any substantial evidence or may be supported under any theory of the law and in connection with this proposition it is argued that the reviewing Court overlooked the fact that Milo M. Turner was more than a

mere bona fide shareholder and director and was in fact the sole officer, the sole director, the sole shareholder and the managing officer of the bankrupt corporation at the time the wage obligations were incurred. That in considering the argument that any claims of Milo M. Turner would, in equity and good conscience, be subordinated in payment to the payments of all other general claims, the reviewing Court considered only cases dealing with bona fide shareholders or directors of bankrupt corporations and did not relate to a situation where all of the aforementioned factors were combined. It is also urged that at the time when Milo M. Turner paid the wage claimants the corporation was insolvent and such payments under the circumstances would amount to capital contributions to the corporation by Turner and could not place him in the status of a prior wage claimant. It is also argued that the evidence was more than sufficient to support a finding that Turner was the *alter ego* of the bankrupt corporation. Lastly, it will be urged that this is an attempt to circumvent the application of Section 60d relating to the reviewing of fees of attorneys for bankrupts by the Referee and would open the door to excessive fees being charged by attorneys for bankrupts and not being subject to review by the Court. From the foregoing arguments it would follow that the corporation paid its own wage claims, that the wage claims then became non-existent and there was nothing left to assign other than a capital interest in the corporation to the appellee or that the claim should be subordinated, as an assignee can acquire no greater rights than his assignor.

ARGUMENT.

I.

The Reviewing Court Should Accept the Referee's Findings of Fact, Conclusions of Law and Order Unless Such Findings Are Clearly Erroneous.

Findings of the Referee in Bankruptcy are presumptively correct and will not be set aside unless clearly erroneous. (*Gold v. Gerson,* 225 F. 2d 859, 861; General Rules of Civ. Proc., Rule 52(a), 28 U. S. C. A., C. C. A. 9th, 1955; *In re Collins,* 141 Fed. Supp. 25 (S. D. Cal.).)

The further proposition that if any of the findings are not clearly erroneous and such findings would support the order, the Court will not reverse the Referee, is so well established as a matter of law that the proposition does not need citation of authority at this point.

II.

Milo M. Turner Was More Than a Mere Shareholder or Director and His Claim in Equity and Good Conscience Would Be Subordinated to the Payment of All Other General Unsecured Claims in the Bankruptcy Matter.

The District Court, in considering the issue presented as to whether or not the claim of Milo M. Turner should be subordinated, concludes at page 35 of the Transcript "the sole issue to be resolved on this review is whether the evidence adduced at the hearing before the Referee is sufficient to support the findings that the bankrupt corporation was the *alter ego* of Milo M. Turner". The only further consideration of this problem which we can find is found in the first four paragraphs on page 37 of the Transcript where the Court cited *In re Dorr Pump & Mfg. Co.,* 125 F. 2d 610 (C. C. A. 7, 1942), for the

proposition that it is immaterial that an assignment be made to a stockholder of a bankrupt corporation. A thorough reading of the said memorandum opinion leaves one with the impression that at no point in the memorandum opinion was any consideration given to the fact that immediately prior to bankruptcy Turner was the only active officer in the bankrupt corporation [see Tr. pp. 45, 46, 53], that Turner was the sole shareholder of the bankrupt corporation [Tr. p. 46], that Turner gave personal guarantees to several creditors [Tr. p. 48], that Turner was the sole responsible officer of the corporation [Tr. p. 53], and the managing officer of the bankrupt corporation at the time the wages were incurred. [Tr. p. 53.]

Finding of Fact No. 1 made by the Referee, the findings being designated in the record on appeal, finds that Turner was President, majority shareholder and managing officer of the bankrupt corporation. Finding of Fact No. 2 finds that Turner was the only acting officer and director of the bankrupt for some time prior to bankruptcy. Finding of Fact No. 9 finds that the appellee knew or should have known of the relationship of Turner to the bankrupt corporation and thus removes him from the status of being a bona fide purchaser for value without knowledge of infirmities. Conclusion of Law No. 2 finds that if Turner has asserted the claim personally, the claim would have been subordinated to the payment of all other general claims on file in the bankruptcy proceedings, and the order provides that the claim be subordinated in payment. It is submitted that the evidence clearly supports each and every one of these findings and the order of the Referee, and that the reviewing Court committed reversible error in failing to consider this issue. The law is clear that under the circumstances Turner's claim would

have been subordinated and the appellee, being the assignee of Turner, could acquire no greater rights than his assignor, Turner. It will be demonstrated below that the law is clear that the claim of Turner would, in equity and good conscience, be subordinated to the claims of all other general creditors herein.

The Bankruptcy Court has full power to subordinate claims and adjust equities. (*Sampsell v. Imperial Paper,* 313 U. S. 215, 85 L. Ed. 1293, 61 S. Ct. 904, 45 A. B. R. (N. S.) 454; *Bank of America v. Erickson* (C. C. A. 9), 45 A. B. R. (N. S.) 503, 117 F. 2d 796.)

Mere reasons of equity may sometimes require that a creditors' claim be either totally disallowed or subordinated to the claims of all or of certain other creditors, such as where the creditor is closely related to the bankrupt or as a majority stockholder or corporate officer should be treated as a proprietor rather than as a creditor. (Vol. 3, Collier on Bankruptcy, 14th Ed., p. 185, Sec. 57.14, and cases cited therein.)

If one entirely controls the affairs of a corporation and owns a substantial part of it and furnishes the corporation money, the funds so advanced will be deemed a capital contribution. He cannot under these circumstances prove a claim in competition with other creditors of the corporation. (*In re Rickshaw,* 12 Fed. Supp. 424 and 426.)

In *Bank of America v. Erickson, supra,* the Court says on page 798, as follows:

> ". . . The Bankruptcy Court has undoubted power to subordinate a general claim to other claims in the same category where for any reason legal or equitable, it ought to be subordinated . . ."

In *Pepper v. Litton,* 308 U. S. 295, the Court states

> ". . . The Bankruptcy Court, in passing on allowance of claims, sits as a Court of equity. In the exercise of its equitable jurisdiction the Bankruptcy Court has the power to sift the circumstances surrounding any claim to see that injustice or unfairness is not done in the administration of the bankruptcy estate . . . Though disallowance of such claims will be ordered where they are fictitious or sham, these cases do not turn on the existence or non-existence of the debt. Rather they involve simply the question of order of payment . . . a sufficient consideration may be simply the violation of rules of fair play and good conscience by the claimant . . ."

Turner was president and the directing head of the corporation. He incurred or permitted the wage claims, giving rise to the appellee's claim, to be incurred with full knowledge of its insolvent financial condition. This is demonstrated by the filing of a petition under Chapter XI and testimony at Transcript, pages 52 and 53. He then, to prevent being prosecuted criminally, paid the claims by picking up the dishonored checks. It would be inequitable under all of the circumstances to permit his alleged claims, arising out of wage claims and checks he signed, to participate in this insolvent estate on an equal basis with either labor claimants or general mercantile creditors who extended credit in good faith believing the corporation to be solvent. In addition to the foregoing Turner guaranteed obligations of the corporation [see Tr. p. 48] "or a portion thereof" and caused the corporation to incur the wage claims involved with knowledge that a keeper was in the premises as the result of the action of a creditor [see Tr. p. 53], caused employees

to hold checks and knew that the corporation was in bad financial condition [see Tr. pp. 52-53], and then, with the expectation of recouping his losses, filed Chapter XI proceedings with the expectation of continuing the business [see Petition for Arrangement under Chapter XI, at pp. 3 to 10 of the Transcript], representing therein that there were officers of the corporation and a Board of Directors [see Resolutions at pp. 10 and 11, Tr. of Record], when, in fact, the only officer of the corporation and the only director was Turner himself, Stanley C. Sorenson having become an officer and a director the day of bankruptcy merely for convenience of signing the schedules. [See Tr. of Record, pp. 45 and 46.]

The most recent decision of the California Supreme Court is *Riddell v. Yosemite Creek Co.,* 158 A. C. A. 390, a 1958 decision. In that case the Court found there were dummy shareholders, that the principal personally guaranteed corporate obligations, that the corporate procedure was not followed, and at 398 the necessity of supplying further capital was recognized and an attempt was made to compete with other creditors if the corporation failed. In its conclusion the Court stated that the principal could not justly continue to do business through the instrumentality of the corporations without financing them sufficiently to meet their obligations. Under the circumstances the Court not only finds that advances made while it was recognized that further capital should be supplied to the corporation, would be treated as capital contributions, making an exhaustive review of the law of the State of California in relation to the *alter ego* doctrine and specifically finds that it was not necessary to show actual fraud but enough to show that when there is unity of ownership and unity of interest the recognition of the

corporate identity would foster fraud or promote injustice, and at 393 of the said opinion states that a finding of *alter ego* is particularly the providence of the trial court and that only general rules could be laid down by the Appellate Court.

Later in this brief it will be argued that Turner merely made capital contributions to the bankrupt when he paid the dishonored wage checks and that for this reason the Court would subordinate any claims of Turner.

III.

To Allow Turner to Participate Ahead of General Creditors of the Corporation Would Be Grossly Inequitable.

The case of *Pepper v. Litton, supra,* holds that salary claims in one man corporations may be disallowed where the Court is satisfied that the allowance of the claim would not be fair or equitable to other creditors. This case also holds that officers and directors are in a fiduciary capacity and cannot do indirectly what they could not do directly.

See the case of *In re Burntside Lodge,* 7 Fed. Supp. 785 (D. C.), 26 Am. B. (N. S.) 59, cited with approval.

It is submitted that in the instant case Turner was a fiduciary and was, under the laws of California, criminally responsible for the payment of the wage claims herein, was a one man corporation and had this corporation been his individual business could not have participated as a wage claimant in his own bankruptcy proceedings nor in his own business, yet the effect of the reversing of the Referee's order is to allow Turner's assignee, the appellee, to do just that.

The learned Judge of the District Court based his memorandum decision logically on his conclusion that no inequity

resulted or would result by virtue of the allowance of the claim herein involved. We submit that this simply is not true as at the time of the payment by Turner of the wage checks involved he most certainly had knowledge of the financial condition of his corporation and most certainly paid the checks to avoid criminal prosecution in the Courts of the State of California. The record is clear that he also had the desire to keep his private corporation operating and the hope that he could pull out of the financial chaos which his corporation faced. This is clearly evidenced by the fact that the proceedings were commenced by the filing of a petition for arrangement under Chapter XI of the Bankruptcy Act, rather than by the filing of an ordinary petition in bankruptcy. We submit that it most certainly would not be fair and equitable to the other creditors of this estate to allow Turner, with knowledge of insolvency, on the eve of the filing of Chapter XI proceedings, to rush out and pay a group of wage claimants on dishonored checks of the corporation, checks which he had signed himself personally [see Tr. p. 53] and thus escape criminal liability on the checks and to further do so with the expectation that there was a chance that the corporation ultimately would return his capital investment. Then he assigned the checks at the time of the filing of the Chapter XI proceedings to his attorney, that is, the attorney for the bankrupt corporation and had prior wage status asserted on the basis of his claim, thus permitting his claim to participate prior to general mercantile creditors of the corporation. We further submit that under the circumstances it would also be grossly inequitable to allow the attorney for the bankrupt corporation, the appellee, who accepted the assignment of these so-called wage checks with full knowledge of Turner's relation

to the bankrupt corporation, and who probably participated in the appointment of Sorenson as a director for purposes of executing the Chapter XI petition, to be allowed a prior wage claim as against the general creditors in the estate for fees in connection with this bankruptcy proceeding. To in effect determine his own fee with no review by the Court as to the reasonableness of the fee is in the teeth of the provisions of Section 60d of the Bankruptcy Act which provides that payments either directly or indirectly to the attorney for the bankrupt on account of fees shall be subject to review by the Bankruptcy Court.

Under such a situation the owner of a one man corporation who, in the instant case is not only the owner but the only active managing director of the corporation, could have his cake and eat it, in that he could advance money to his own corporation at any time on behalf of delinquent wages and thus constitute himself a prior wage claimant in his own corporation, even though the moneys were advanced to keep his corporation operating and with a clear expectation that if the business succeeded his capital investment would be returned, and if, on the other hand, the business failed and ran up further obligations, he could then assert prior wage status and recover his advances ahead of other creditors of his corporation. Under such circumstances, one could advance money to his own failing business as a portion of his invested capital, knowing that the business is in a shaky condition, without taking any risk whatever that capital so advanced could be lost. Turner very clearly expected this business to succeed when he filed Chapter XI proceedings. He had hopes of obtaining an additional $60,000.00 capital by the release of certain bushings from the S. C. O. Tool Co. as evidenced by the testimony of his attorney, the claimant

herein, at pages 70 and 71 of the Transcript. We submit that under the circumstances, the Court should look through the form of Turner paying debts of the corporation with his personal funds, disregarding any distinction between the payment of wage checks or any other obligations of the corporation. Stripped of the niceties the corporation needed capital to continue business. Turner, the sole shareholder, sole director, sole officer and managing officer of the corporation and the only person who stood to profit from the success of the business, knew that to continue operations the corporation must have additional capital. He knew there was a keeper in the business and that employees would, of necessity, have to be paid or the business cease operations. He raised personal funds and paid the corporation's delinquent wages thus enabling the corporation to continue business in hopes that he can save his prior investment. We submit that had it been necessary for Turner to pay the rent of the bankrupt corporation or to pay general mercantile creditors in order to secure further supplies for the corporation, no different situation would have existed than was the case with labor claimants. The corporation simply had to have money to continue operations and to give Turner any hope of return on his capital investment.

Turner or his assignee now argues that Turner's payment of wages benefited the creditors as wages would have, in any event, participated ahead of general unsecured creditors and that Turner's claim, therefore, should now be accorded prior wage status ahead of the other creditors. This argument overlooks the fact that had Turner not paid the wages the business probably would have ceased operations immediately and that further claims concerning the lease rentals and equipment, rent, etc. and attor-

ney's fees in connection with the Chapter XI proceedings, receiver's fees in connection with the Chapter XI proceedings and other expenses would not have been incurred by the corporation as the result of Turner's efforts to continue the business. Instead, Turner paid the wage claimants, continued the business in operation, filed a Chapter XI proceeding, incurred on behalf of the corporation the costs of Chapter XI proceedings, the attorney's fees of the claimant, and the costs of a Court appointed receiver [see Tr. p. 12]. We submit that under the circumstances the Referee on the evidence before him committed no error in finding in his Conclusion of Law No. II [see Tr. p. 21] that if Turner had asserted a claim based on the checks in question the claim would have been subordinated in payment and in ordering that the claim be allowed as a general unsecured claim only and in further ordering that the claim be subordinated, basing his said Findings and Order upon the equitable principles enunciated above.

IV.

Turner's Payment of Wage Claims Amounted to a Capital Contribution to the Bankrupt.

A reading of the Memorandum Opinion of the District Court leaves one with the definite opinion that he entirely overlooked the issue regarding whether or not Turner's claim should be subordinated as a capital contribution.

It is submitted that the main reason given in many opinions relating to the subordination of claims hinge on the fact that the funds advanced were capital contributions to the capital of the corporation. (See *Pepper v. Litton, supra;* and *Riddle v. Yosemite Creek Co., supra.*) It is further submitted that for the reasons set forth above these transactions amounted to capital contributions

by Turner and the District Court erred in not considering this issue and in reversing the Referee's Findings which definitely find support in the record and more particularly Conclusion of Law number IV [see Tr. p. 21] which is clearly supported by the fact that Turner's contributions were capital contributions.

V.

Under California Law, Turner Was the Alter Ego of Zipco.

The case of *Riddle v. Yosemite Creek Co., supra,* at 393, holds that a finding of *alter ego* is particularly within the providence of the trial court. The general rule laid down in that case and in the case of *Katenkamp v. Superior Court,* 16 Cal. 2d 696, 108 P. 2d 1, is that if there is unity of ownership and interest "it is not necessary that actual fraud be shown. It is sufficient if a refusal to recognize the identity of the individual with that of the individual would bring about inequitable results." The *Katenkamp* case was cited with approval in *Hudson v. Wylie* (C. C. A. 9, 1957), 242 F. 2d 435, at 442, Petition for Writ of Certiorari denied.

There can be no doubt that Turner was the sole owner of Zipco. See argument and references to the transcript above. Some of the criteria laid down in the *Riddle* case regarding unity of interest are: insufficient capital and knowledge of the same; failure to conform to corporate procedure; personal guarantees of corporate obligations and an attempt to compete with other creditors. (See 396 of the Opinion.)

Here there was a failure to conform with corporate procedures as the record shows that Turner was the only director or officer and that Sorenson was appointed only

for convenience. This was a direct violation of Sections 301 and 800 of the Corporations Code of the State of California providing that a corporation shall have not less than three directors. If Turner was the only officer and director how could Zipco have had shareholder's or director's meetings or for that matter, carried on any business as an entity separate from Turner? Here Turner guaranteed accounts of the bankrupt including the S. C. O. Tool Co. account, a very large account. [See Tr. pp. 48, 70-71.] Here Turner had knowledge that the corporation had insufficient capital as evidenced by the keeper in the premises [See Tr. p. 53], by the filing of Chapter XI proceedings, and by his having loyal employees hold checks. [See Tr. pp. 52-53.] Turner evidenced his intention to compete with other creditors by his assignment of the checks to the claimant and that an inequitable result would be reached by not piercing the corporate veil has been amply demonstrated in the various arguments above.

At pages 35 and 36 of the Transcript may be found the reasoning of the District Court regarding the *alter ego* issue. He relied on *Hollywood Cleaning and Pressing Co. v. Hollywood Laundry Service,* 217 Cal. 124, 17 Pac. 709, a 1932 case decided some eight years prior to the *Katenkamp* case, *supra,* and 26 years prior to the *Riddle* case, *supra,* upon *Norens Realty Co. v. Consolidated A & T Co.,* 80 Cal. App. 2d 879, 182 P. 2d 593, a district court case which is not persuasive in view of the *Katenkamp* and *Riddle* cases decided by the State Supreme Court, and on *Wenban Estate v. Hewlett,* 193 Cal. 675, 696, 227 Pac. 723, 731, a 1924 case superceded by the above referred to later *Katenkamp* and *Riddle* cases. On page 36 he goes on to reason that actual fraud must be shown or bad faith.

The *Katenkamp* case and the *Riddle* case each review the law of California and specifically hold that it is not necessary to show actual fraud and it is sufficient if inequitable results would result from recognizing the corporate identity. See quote, *supra.* It is submitted that the District Court did not follow state law and that the cases he relied upon have been overruled either by implication or directly by the *Katenkamp* and *Riddle* cases and under applicable law the Referee did not err in finding the corporation to be the *alter ego* of Turner.

It follows that if the corporation was a mere *alter ego,* Turner paid his own obligations and the debts were cancelled upon payment and nothing was left to assign to the appellee herein.

VI.

The Door Pump Case Was Not Properly Applied.

At page 37 of the Transcript the District Court cites the case of *In re Door Pump and Mfg. Co.,* 125 F. 2d 610 (C. C. A. 7, 1942), as controlling the issue as to whether Turner could have been a valid assignee of wages. That case considers only bona fide shareholders, makes no consideration of any added facts such as a sole shareholder, officer, manager and director and no such facts appear in that case. It simply does not apply to the situation presented in the instant case and we believe that the District Court overlooked the added facts referred to and thus did not properly consider the issue.

VII.

The Appellee's Claim Is Subject to Review Under Section 60d of the Bankruptcy Act.

Section 60d of the Bankruptcy Act, U. S. Code, Title 11, Chap. 6, Sec. 96, in substance provides that fees paid attorneys for bankrupts either directly or indirectly for services in connection with the bankruptcy proceedings shall be subject to review by the Referee. If *alter ego* doctrine applies it follows that the bankrupt paid the fees and 60d applies.

If the Court sanctions the attorney induced device used herein it is clear that the same will be a prolific breeder of a method to circumvent Section 60d and for attorneys to charge excess fees without court scrutiny. For that reason, if none other, the Court should look upon the appellee's claim with a jaundiced eye.

Conclusion.

The above arguments amply illustrate the errors of the District Court in reversing Referee Rifkind and the District Court's failure to adequately consider issues before the Court. It would be indeed shocking if the owner and manager of a one man corporation or his assignee should be allowed prior wage status ahead of the very trade creditors he created. To sanction the methods herein employed by the appellee would breed a group of subtle evasions to the letter if not the spirit of Section 60d of the Bankruptcy Act relating to Court regulation of fees for attorneys for bankrupt.

For the reasons set forth above it is respectfully urged that the Order of the District Court be reversed and the Order of the Referee affirmed.

Dated: April 24, 1958.

Respectfully submitted,

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